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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1077**

State of Minnesota,
Respondent,

vs.

Scott Erwin Flowers,
Appellant.

**Filed May 6, 2019
Affirmed
Jesson, Judge**

Nicollet County District Court
File No. 52-CR-17-42

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Michelle M. Zehnder Fischer, Nicollet County Attorney, James P. Dunn, Chief Deputy
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Considered and decided by Johnson, Presiding Judge; Ross, Judge; and Jesson,
Judge.

UNPUBLISHED OPINION

JESSON, Judge

After responding to a 911 call, police encountered appellant Scott Erwin Flowers
parked on the wrong side of the road, facing the wrong direction. Police subsequently

arrested Flowers and charged him with driving while impaired (DWI) test refusal. After denying his motion to suppress evidence on the grounds that he was unconstitutionally seized and that his right to counsel was violated—a decision Flowers challenges—the district court convicted Flowers. Because police had reasonable, articulable suspicion to seize Flowers and because his right to counsel was vindicated, we affirm.

FACTS

Police received a call about an SUV parked on the side of a rural, gravel road. The caller told police that it looked like someone was in the vehicle behind the steering wheel, but they were not moving, and he was unsure if the individual was “passed out drunk.” Dispatch alerted police officers who were out on patrol.

Two officers in separate police vehicles responded to the location of the SUV. The vehicle—which had its low-beam lights on—was parked to the side of the eastbound lane facing west, indicating that it was parked on the wrong side of the road facing the wrong direction. One officer pulled up from the eastbound lane and positioned his vehicle slightly to the side and in front of the SUV. The second officer, who arrived within a minute of the first officer’s arrival, approached from the westbound lane and pulled up behind the vehicle, slightly to the side. Both officers activated their emergency lights.

One officer approached the SUV and began pounding on the passenger-side window. After receiving no response from the driver—who police later identified as appellant Scott Erwin Flowers—both officers approached the vehicle in an effort to wake him. Flowers eventually woke up and rolled down his window, and the officers immediately smelled alcohol. The officers then asked Flowers to get out of his vehicle.

Flowers could not get out of the SUV on the driver's side because of a steep incline, so the officers assisted Flowers in getting out on the passenger side. Flowers showed visible signs of intoxication, including red and watery eyes and an unsteadiness in his movements. After Flowers refused to perform a variety of field sobriety tests, one of the officers arrested him.

Police took Flowers to the county jail, where he was read the implied-consent advisory. As part of that advisory, the officer informed Flowers that he had the right to consult with an attorney before deciding whether to take a breath test to determine if he was intoxicated. Flowers asked to speak with an attorney, and the officer provided him with a telephone and a phone book. During this time, Flowers repeatedly asked to call his wife, but the officer told him that he could not do so. After making some phone calls, Flowers indicated that he was finished contacting an attorney. Flowers then refused to take a breath test. The state subsequently charged Flowers with DWI-test refusal.¹

Before trial, Flowers moved to suppress all evidence, arguing that police officers unconstitutionally seized him and that his right to counsel was not vindicated.² At the motion hearing, the only testimony presented was from one of the police officers, who testified to the facts described above. The officer additionally testified that it was odd for Flowers to be parked on the wrong side of the road because there was ample parking on the correct side of the road. And he clarified that he activated his emergency lights for his own safety and the safety of other drivers. The officer also noted that while he initially

¹ The state also charged Flowers with fourth-degree DWI, which was dismissed.

² In his motion, Flowers stated that the "stop" of his vehicle violated the U.S. Constitution, but made clear at the motion hearing and in subsequent briefing that he was referring to the officers' encounter with Flowers, even though they did not actually stop him.

thought that Flowers may have been experiencing a medical or alcohol-related incident, it became apparent to him that Flowers was intoxicated once he rolled down his window and began interacting with the officers.

The district court denied Flowers's motion to suppress evidence, concluding that police did not unconstitutionally seize Flowers and that police honored Flowers's right to consult with an attorney. After the district court denied his motion, Flowers agreed to proceed with a court trial and stipulated to the state's evidence. The district court convicted Flowers of DWI-test refusal and sentenced him to 365 days in jail, with 335 days stayed for two years. Flowers appeals, arguing that the district court improperly denied his motion to suppress evidence.

D E C I S I O N

Flowers asserts that the district court erroneously denied his motion to suppress evidence for two reasons. First, he contends that the district court incorrectly concluded that police officers had reasonable, articulable suspicion to seize him. Second, Flowers maintains that the district court erred by determining that his right to counsel was not violated. We review each argument in turn.

I. Police officers had reasonable, articulable suspicion to seize Flowers.

Flowers argues that the district court erred by concluding that police had reasonable, articulable suspicion to seize Flowers when they ordered him to exit his vehicle. When reviewing a district court's order on a motion to suppress evidence, this court reviews factual findings for clear error and applies a de novo standard of review to legal conclusions. *State v. Jordan*, 742 N.W.2d 149, 152 (Minn. 2007). To address Flowers's

argument, we must first determine whether Flowers was seized, and if so, at what moment. If we conclude a seizure took place, we then evaluate whether police officers had reasonable, articulable suspicion when they seized Flowers.

Seizure of Flowers

Both the United States and Minnesota Constitutions guarantee individuals the right to be free from unreasonable searches and seizures. U.S. Const. amend. IV; Minn. Const. art. I, § 10. But not every encounter between police and an individual constitutes a seizure. *State v. Cripps*, 533 N.W.2d 388, 390 (Minn. 1995). “[A] seizure occurs when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen.” *State v. Klamar*, 823 N.W.2d 687, 692 (Minn. App. 2012) (quotation omitted). Further, a person is considered seized by police officers if, considering all of the circumstances, a reasonable person would not feel free to disregard police questions or end the encounter. *State v. Harris*, 590 N.W.2d 90, 98 (Minn. 1999).

Although a seizure generally occurs when a police officer stops a vehicle, *Whren v. United States*, 517 U.S. 806, 809-10, 116 S. Ct. 1769, 1772 (1996), courts have held that “it does not by itself constitute a seizure for an officer to simply walk up and talk to a person standing in a public place or to a driver sitting in an already stopped car.” *State v. Vohnoutka*, 292 N.W.2d 756, 757 (Minn. 1980). When evaluating whether police seized an individual, we review the totality of the circumstances for factors that may indicate a seizure occurred, including “the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer’s request might be

compelled.” *United States v. Mendenhall*, 446 U.S. 544, 554, 100 S. Ct. 1870, 1877 (1980). Further, when an officer’s squad car is used to block a parked vehicle, the stop generally constitutes a seizure. *See State v. Lopez*, 698 N.W.2d 18, 22 (Minn. App. 2005); *Klotz v. Comm’r of Pub. Safety*, 437 N.W.2d 663, 665 (Minn. App. 1989), *review denied* (Minn. May 24, 1989); *State v. Sanger*, 420 N.W.2d 241, 243 (Minn. App. 1988). Here, all of these circumstances come into play.

Two police officers in two separate police vehicles pulled diagonally in front of and behind Flowers’s SUV, their emergency lights activated. As a result, Flowers was largely prevented from leaving. More than one officer was present. And one officer proceeded to bang on the window of Flowers’s SUV. Considering the totality of the circumstances, a reasonable person in Flowers’s position would not have felt free to end the police encounter. *Harris*, 590 N.W.2d at 98. Accordingly, we conclude that police seized Flowers when they parked diagonally in front of and behind his SUV, activated their emergency lights, and pounded on his window. *See Lopez*, 698 N.W.2d at 22 (holding that an individual was seized when a police officer, whose emergency lights were activated, pulled into a parking lot, partially blocked the individual’s vehicle, and pounded on the car window to awaken the individual).

The state maintains, and the district court concluded, that the initial police contact before officers ordered Flowers out of the SUV did not amount to a seizure. In support of this position, the state argues that police did not stop Flowers, had a duty to conduct a welfare check, and that the use of emergency lights did not transform the initial contact

into a seizure.³ But we note that our analysis of whether an individual was seized considers the totality of the circumstances. *Mendenhall*, 446 U.S. at 554, 100 S. Ct. at 1877. Although approaching a stopped vehicle or using emergency lights does not per se render police conduct a seizure, these factors are relevant to our totality of the circumstances analysis.⁴ *Lopez*, 698 N.W.2d at 22. And although an officer is generally justified in conducting a welfare check if circumstances lead a police officer to conclude that something is wrong, *Klamar*, 823 N.W.2d at 693-94, we note that police actions during a welfare check can still amount to a show of authority such that a reasonable person would not feel free to leave.

Here, the presence of multiple police officers, the positioning of police vehicles, the use of emergency lights, and the pounding on Flowers's window warrants the conclusion that police actions constituted a show of authority such that a reasonable person in

³ The state also contends that because Flowers appeared to be asleep or unconscious until after the officers pounded on his window, he was unaware of the presence of law enforcement. Accordingly, the state argues, a reasonable, unconscious person would not feel as if their liberty had been restrained. Even if we adopted the state's argument, Flowers still would have been seized at the moment he woke up to the knocking on his window—before the officers ordered him out of the vehicle—and two police vehicles with emergency lights activated were parked diagonally in front of and behind his SUV.

⁴ In support of its argument regarding the use of emergency lights, the state cites *State v. Hanson*, 504 N.W.2d 219, 220 (Minn. 1993), a case where the supreme court held that a police officer's use of flashing red lights when pulling up and stopping behind a car on the shoulder of a highway at night did not render the encounter a seizure. But the supreme court in *Hanson* also noted that flashing lights “may be used as a show of authority” and acknowledged that “in many fact situations the officer's use of the flashing lights likely would signal to a reasonable person that the officer is attempting to seize the person for investigative purposes.” 504 N.W.2d at 220. Here, the presence of two police officers and the positioning of their vehicles both in front of and behind Flowers's SUV factually distinguishes this case from *Hanson*.

Flowers's position would not have felt free to leave. Accordingly, we conclude that police seized Flowers before they ordered him to exit the vehicle.

Reasonable, Articulable Suspicion to Seize Flowers

Because we conclude that police officers seized Flowers, we must determine whether that seizure was constitutional. One lawful basis for a seizure “is if an officer has a particular and objective basis for suspecting the particular person [seized] of criminal activity.” *Lopez*, 698 N.W.2d at 22-23 (quotation omitted). An officer’s decision to seize a person may be justified based on the totality of the circumstances, and an officer “may draw inferences and deductions that might elude an untrained person.” *Harris*, 590 N.W.2d at 99 (quotation omitted). But “a mere hunch, absent other objectively reasonable articulable facts, will not justify a seizure.” *Id.*

Based on the record, the officers had reasonable, articulable suspicion to seize Flowers. Officers were informed of a 911 call in which the caller stated that he did not know if the driver was “passed out drunk or what.” Upon responding to this call, the officers saw an SUV precariously parked on the wrong side of the road—near a steep drop-off—facing the wrong direction. And the SUV’s lights were still on. One officer noted that as he responded to the call, he saw swerve marks on the road. Considering these facts, the officers had reasonable, articulable suspicion to seize Flowers.⁵ Because officers

⁵ Flowers contends that these facts are consistent with noncriminal activity and that he “may have simply been napping.” We are not persuaded, particularly given the officer’s testimony that there was room for Flowers to pull over and park on the correct side of the road.

had reasonable, articulable suspicion to seize Flowers, the district court did not err by denying his motion to suppress evidence.

II. Police vindicated Flowers's right to consult with an attorney.

Flowers also argues that the police officer did not honor his right to consult with an attorney before deciding whether to submit to a breath test. Specifically, Flowers contends that police prohibited him from contacting his wife to seek assistance finding an attorney. The question of whether an officer has vindicated a driver's right to counsel presents a mixed question of law and fact. *Mell v. Comm'r of Pub. Safety*, 757 N.W.2d 702, 712 (Minn. App. 2008). Accordingly, we review factual findings for clear error. *Id.* But in cases where facts are not in dispute, we review de novo whether an individual's right to counsel was violated. *Id.*

Before deciding whether to submit to chemical testing, a driver has the right to consult with an attorney. *State v. Christiansen*, 515 N.W.2d 110, 112 (Minn. App. 1994), *review denied* (Minn. June 15, 1994). As part of this right, "police officer[s] must provide drivers [with] a telephone and a reasonable amount of time to contact and [speak] with counsel." *Id.* Officers must also allow a driver to contact a family member to obtain the name and phone number of an attorney. *State v. Karau*, 496 N.W.2d 416, 418 (Minn. App. 1993). But police officers are not required to allow a driver to contact a non-attorney for the purpose of seeking advice. *Stefano v. Comm'r of Pub. Safety*, 358 N.W.2d 83, 84-85 (Minn. App. 1984).

Here, the officer told Flowers that he had the right to consult with an attorney before deciding whether to submit to testing. Flowers mumbled something about talking to his

wife and asked if he could call her, and the officer noted that he was providing Flowers with information about contacting an attorney. Flowers indicated that he understood what the officer explained to him and then used the provided phone and telephone book to call—and presumably speak with—an attorney. The officer reiterated to Flowers that he was to use the allotted time to try and contact an attorney, not his wife. When Flowers appeared to be finished with his conversation, the officer asked if he was done, and Flowers again asked if he could call his wife. The officer repeated that this was Flowers’s time to speak with an attorney, and Flowers told the officer that he was finished doing so.

Based on this exchange, the district court determined that the officer vindicated Flowers’s right to counsel, provided Flowers with the means and time to contact an attorney, and that Flowers did not say anything to the officer that indicated that his wife knew the phone number of a certain attorney or was an attorney herself. Further, the district court concluded that based on the entire transcript, Flowers was able to speak with someone who the officer believed was an attorney, and the officer did not force Flowers to end the conversation. Accordingly, the district court concluded that Flowers’s right to counsel was vindicated. We agree.

Caselaw regarding an individual’s right to consult with a family member in order to obtain an attorney’s information dictates that a driver bears the responsibility of clearly communicating that their reason for contacting a family member is so the family member can assist them with contacting an attorney. *See Christiansen*, 515 N.W.2d at 113 (identifying as a “crucial element” the fact that the driver did not tell the officer he wanted to obtain the name of an attorney from his parents); *Karau*, 496 N.W.2d at 417 (holding

that a driver's right to counsel was violated where a police officer did not allow him to contact his parents when he requested to do so specifically to obtain the name of an attorney).

Although Flowers perhaps implied to the officer that he wanted to call his wife for assistance in contacting an attorney, nothing in the record indicates that Flowers ever directly told officers that his reason for contacting his wife was to obtain from her the name of an attorney. Further, it appears Flowers was able to contact and speak with an attorney. Accordingly, the district court correctly concluded that Flowers's right to counsel was vindicated.⁶

In sum, we conclude that police officers seized Flowers but that the seizure was constitutional because it was supported by reasonable, articulable suspicion. And because Flowers did not clearly communicate to police why he wanted to contact his wife, his right to counsel was not violated.

Affirmed.

⁶ Flowers appears to argue that his case is distinguishable from *Christiansen* because the facts from that case indicated that the officer and the driver had an uncontentious conversation, whereas here, Flowers was unable to fully explain why he wanted to contact his wife because of the officer's hostility. But again, Flowers bears the burden of communicating with officers his purpose for wanting to contact his wife. *Christiansen*, 515 N.W.2d at 112-13. Because he did not communicate his reason for wanting to call his wife, the officer did not violate Flowers's right to counsel by not allowing him to do so.